MALAYAN BANKING BHD.

v.

SENORITA HOLDINGS SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C2-23-3364-1986]
27 OCTOBER 1990

CONTRACT: *Guarantee - Principal debtor - Sureties - Whether past consideration - Continuing guarantee - Effect of - Unilateral variation of interest rate - Claim by guarantor that he signed blank guarantee form - Knowledge of existence of loan to principal - No provision in guarantee requiring plaintiff to inform guarantors of any change in the interest rate.*

The 1st defendants (D1) applied for and were granted a term loan facility by the plaintiff (MBB). By a letter of guarantee dated 10 January 1986, the 2nd and 3rd defendants (D2 and D3) guaranteed to pay on demand by MBB all monies owing to MBB from D1 arising from the loan facility.

D1 defaulted and MBB claimed against all 3 defendants. MBB successfully obtained final judgment.

This was the appeal by D2 against that decision, arguing that:

(a) the guarantee was void and unenforceable against him for want of consideration or alternatively, consideration was past consideration and was therefore void and unenforceable against him as the letter of guarantee was executed after the loan facility was approved;

(b) MBB had varied the interest rate on the loan facility without his consent and therefore he was not liable; further any variation of the rate of interest must be agreed upon by MBB and D1. As D2 was not informed of any such agreement, he is discharged from any liability under the guarantee and

(c) the guarantee was executed by him in blank on the representation made by MBB that this was a mere formality required for the approval of the loan.

Held:

[1] It was clear from the preamble to the letter of guarantee and the words "continuing an account with" that at the time the letter of guarantee was executed, the facility was already in existence. Paragraph 4 further states that the guarantee was a continuing guarantee and as such the consideration was good.

[2] It is clear from the letter of application for the loan, which was signed by D2, and the resolution of D1, which was signed by D2 and D3, that D2 was one of those instrumental in obtaining the loan facility. Therefore when he signed the guarantee, he knew of the existence of the loan.

[3] Under the loan agreement, MBB was entitled to change the interest rate at its own discretion. The guarantee did not require MBB to inform the guarantors of any variation in the interest rate. This is further set out in clause 12 of the letter of guarantee. Therefore the said variations did not affect D2's liability under the letter of guarantee.

[4] Except for the preamble, para. 4 and the space for the date and signatures and the particulars of the persons who sign the letter of guarantee, all the terms of the guarantee were already printed on the document. Any person who signs the document before the particulars are filled in should know that he is signing a letter of guarantee and no other document.

[5] In the absence of any allegation of fraud or misrepresentation, the letter of guarantee was valid and D2 was bound by the terms of the guarantee even if the particulars had not been filled in at the time it was signed by him.

[D2's appeal dismissed with costs.]

Cases referred to:
Heng Chang Swee v. Bangkok Bank Ltd. [1976] 1 MLJ 267 ***(cit)***
Midland Countries Motor Finance Co. Ltd. v. Slade [1950] 2 All ER 821 ***(cit)***
Ming Lian Construction Sdn. Bhd. v. Haji Noordin [1974] 1 MLJ 52 ***(cit)***
Paulo Varghese & Ors. v. Ittipe Abraham & Ors. [1952] AIR Tr 202 ***(dist)***
Ram Norain v. Lt. Col. Hari Singh & Anor. [1962] AIR Raj 76 ***(dist)***

For the defendant - Eugene Tan; M/s. Eugene Tan & Co.
For the respondent - Philip Chai; M/s. Soo Thien Ming & Shahrizat

JUDGMENT

Zakaria Yatim J:

This is an appeal by the second defendant against the decision of the Senior Assistant Registrar given on 14 June 1988 granting the plaintiff's application for final judgment against him and costs.

On 20 August 1985, the plaintiff, in response to the first defendant's application, wrote a letter to the first defendant stating that the plaintiff had approved a term loan facility for RM285,000 subject to the terms and conditions therein. The terms and conditions contained in the letter were duly accepted by the first defendant by signing at the bottom of the letter. By a letter of guarantee dated 10 January 1986, the second and third defendants guaranteed to pay the plaintiff on demand all monies owing to the plaintiff from the first defendant arising from the loan facility.

The plaintiff's claim against the first defendant is for the sum of RM324,678.39 which was due under the term loan facility with interest at the rate of 3.5% per annum above the base lending rate of 9.75% per annum with yearly rests from 18 January 1987 to the date of realisation. The plaintiff's claim against the second and third defendant is for the sum of RM285,000 being the total liability under the letter of guarantee, together with interest at the rate of 3.5% per annum above the base lending rate of 9.75% per annum with yearly rests from 14 August 1986 to the date of realisation and costs.

In his re-amended statement of defence, the second defendant raises three points. In para. 4 he states that at all material times the guarantee was executed by him in blank on the representation made by the plaintiff that this was a mere formality required for the approval of the loan. Accordingly he contends that the guarantee is ineffective. In para. 6 he states that the guarantee is void and unenforceable against him for want of consideration. Alternatively he says that the consideration was past consideration and therefore void and unenforceable against him. In para. 8 he states that the plaintiff had varied the interest rate on the loan facility without his consent and knowledge and because of the variation he is

not liable under the letter of guarantee. He further states that any variation of the rate of interest must be agreed upon between the plaintiff and the first defendant. As the second defendant was not informed of any such agreement, he is discharged from any liability from the guarantee.

Encik Mohd. Radzi, Counsel for the second defendant submitted that as the letter of guarantee was executed after the loan facility was granted, the guarantee was not supported by any valid consideration. In support of his submission he relied on two Indian decisions. The first case is *Ram Norain v. Lt. Col. Hari Singh & Anor.* [1962] AIR Raj. 76. In that case Beri J decided that anything done or any promise made for the benefit of the principal debtor must be contemporaneous to the surety's contract of guarantee in order to constitute consideration therefor. A contract of guarantee executed afterwards without any consideration is void. The learned Judge decided that in that case the contract of guarantee was one without consideration. The second case is *Paulo Varghese & Ors. v. Ittipe Abraham & Ors.* [1952] AIR Tr. 202. In that case after a debt had been contracted, the surety came forward and promised that he would see that the debtors duly discharged their obligation. The Court held that the promise was not supported by consideration and it could not be enforced in a Court of law.

Mr. Philip Chai, Counsel for the plaintiff referred to the letter of guarantee, in particular to the preamble. He also referred to a circular resolution of the first defendant dated 4 September 1983 as well as the first defendant's letter to the plaintiff applying for the loan facility.

I shall now examine these documents. In the letter of guarantee the preamble states:

> In consideration of your opening or continuing an account with and making advances, loans or otherwise giving credit or accommodation to Senorita Holdings Sdn. Bhd. of Lot Nos. 2.22-2.24, 2nd Floor, Wilayah Kompleks, Jalan Dang Wangi, Kuala Lumpur (hereinafter called "the customer") at my/our request, for as long as you may at your sole discretion deem fit
>
> I/We 1 Abdullah Hisham bin Mohd Hashim (NRIC NO. 5465400) of No. 24, Jalan C5, Phase 3, Taman Melawati, Ulu Klang, Selangor.
>
> 2 Tan Lin Mei (NRIC NO. 4882355) of 2601, Jalan Permata 15, Taman Permata, Ulu Kelang, Selangor.
>
> the undersigned hereby jointly and severally agree with and guarantee you as follows,

I emphasise the words "continuing an account which", which show that at the time the letter of guarantee was executed the facility was already in existence. Paragraph 4 of the letter of guarantee states that "This guarantee shall be ... a continuing guarantee to you ..." The second defendant knew about the granting of the loan facility to the first defendant. Indeed it was him who signed the letter addressed to the plaintiff applying for the loan. At p. 2 of the letter he stated that he was the executive chairman of the first defendant. It is stated in the plaintiff's letter of offer dated 20 August 1985 that one of the conditions for the granting of the loan is that the first defendant must forward a certified true copy of the board's resolution of the first defendant authorising the borrowing and the acceptance of the term loan facility. In compliance with this condition the first defendant passed the circular resolution dated 4 September 1985 accepting the terms and conditions of the letter of offer. The circular resolution was signed by the second and third defendants as directors of the first defendant.

From the documentary evidence it is clear that the second defendant was one of those who were instrumental in getting the loan facility. Therefore when he signed the letter of guarantee he knew of the existence of the loan. The Court need only look at the terms of the letter of

guarantee and it is clear from the preamble and para. 4, that the guarantee is a continuing guarantee. See *Heng Cheng Swee v. Bangkok Bank Ltd.* [1976] 1 MLJ 267. Since it is a continuing guarantee, in my view there is good consideration. The two Indian decisions cited by Encik Mohd. Radzi do not apply to the present case as those decisions did not deal with the question of continuing guarantee.

Encik Radzi next argued that there was a change in the interest rate and therefore there was a variation in the terms of the agreement. In the letter of offer interest rate is stated as follows:

> Interest rate: Base lending rate
> 3 1/2 p.a. (yearly rests).
> Currently at 13.75% p.a.
> (Interest rate is variable at the bank's sole discretion).

Under the loan agreement therefore, the plaintiff is entitled to change the interest rate at its own discretion. In other words, the plaintiff does not have to seek the consent of the first defendant to change the interest rate. Similarly the plaintiff is not required to inform the guarantors and obtain their consent before changing the interest rate. Clause 12 of the letter of guarantee clearly states in the following words:

> I/We hereby agree that you shall be at liberty without any further consent from me/us and without thereby affecting my/our liability under the guarantee at any time to determine enlarge or vary any credit to the customer

The plaintiff is only required to inform the guarantors if there is provision in the guarantee requiring the plaintiff to inform the guarantors. See *Midland Countries Motor Finance Co. Ltd. v. Slade* [1950] 2 All ER 821. In the present case there is no such provision. In the circumstances any variation in the rate of interest without the knowledge or consent of the second defendant does not affect his liability under the letter of guarantee.

Encik Mohd. Radzi in his submission did not touch on one other point raised in the re-amended statement of defence. According to the second defendant he executed the letter of guarantee in blank. I have examined the letter of guarantee. Except for the preamble, para. 4 and the space for the date and signatures and the particulars of the persons who sign the letter of guarantee, on the third page of the letter of guarantee, all the terms of the guarantee are already printed on the document. Any person who signs the document before the particulars are filled in should know that he is signing a letter of guarantee and no other document. The printed words "We ... the undersigned hereby jointly and severally agree with and guarantee you ..." are explicit enough. Furthermore the second defendant knew all the time that the first defendant was applying for a loan from the plaintiff. He wrote the application letter to the plaintiff and he signed the circular resolution of the first defendant. He even signed at the bottom of the letter of offer accepting the terms and conditions of the loan facility. If he read the letter of offer at page one under "security" he would see his name and the name of the third defendant as directors of the first defendant who were required to sign the letter of guarantee. The second defendant has not made any allegation of fraud or misrepresentation in his defence. In the absence of any allegation of fraud or misrepresentation, the letter of guarantee is valid and he is bound by the terms of the guarantee even if the particulars had not been filled in at the time it was signed by the second defendant. See *Credit Corporation (Malaysia) Bhd. v. Tuanku Hishamuddin bin Tuanku Laksamana Nasir & Anor.* Kuala Lumpur Civil Suit No. C5708 of [1985] (unreported); and *Ming Lian Construction Sdn. Bhd. v. Haji Noordin* [1974] 1 MLJ 52.

For the reasons stated above I find that the second defendant has no defence to the plaintiff's claim and therefore order that the appeal be dismissed with costs.

Also found at [1991] 3 CLJ 2888